

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORDARO LEVILE HARDY,

Defendant-Appellant.

UNPUBLISHED

October 19, 2010

No. 292998

Genesee Circuit Court

LC No. 07-020165-FC

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, assault with intent to rob while armed, MCL 750.89, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 37-1/2 to 60 years for the murder conviction, 23-3/4 to 60 years each for the assault and conspiracy convictions, and 140 months to 20 years for the home invasion conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. BACKGROUND

Defendant's convictions arise from the fatal shooting of Jerry Quackenbush during an attempted robbery at Quackenbush's home in Flint Township in March 2007. The evidence showed that defendant accompanied Gilbert Lopez and three other individuals, Cecil Thornton, Ricky Clements, and Randy Percy James, to the victim's home, and that defendant supplied a 410-gauge shotgun and a .22-caliber handgun for use during the robbery. Another individual, Matthew Clement, was part of the original group that intended to rob the victim, but decided not to participate after defendant complained that there were too many people inside Thornton's vehicle. Defendant was tried jointly with codefendants Lopez and James, before separate juries. Thornton, Ricky Clements, and Matthew Clement were also all charged in the matter, but they each pleaded guilty to reduced offenses and testified at defendant's trial pursuant to their plea agreements. According to Thornton and Ricky Clements, Lopez shot the victim with the 410-gauge shotgun at the doorway to the victim's house after the victim answered his knock on the door. Law enforcement officers found a gun under the victim's body during their investigation. Defendant later led law enforcement officers to a house where the 410-gauge shotgun was found.

II. PROSECUTOR'S CONDUCT

Defendant first argues that the prosecutor engaged in misconduct by knowingly using the false and perjured testimony of the three accomplices, Thornton, Ricky Clements, and Matthew Clement, to obtain his convictions. Because this issue was never raised below or presented to the trial court, it is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Consistent with a defendant's due process right to fundamental fairness, a prosecutor may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). However, knowledge of false testimony is not imputed to a prosecutor simply because it conflicts with another statement. *Id.* at 278-279. It is similarly insufficient to show that the prosecutor presented witnesses with contradictory stories. *United States v Sherlock*, 962 F2d 1349, 1364 (CA 9, 1992).

Contrary to what defendant asserts on appeal, the sole disputed issue at trial was not whether he "actively participated" in the offense. The defense theory at trial was that the evidence failed to show that defendant was even present during the offense. Apart from the testimony of Thornton and Ricky Clements, who placed defendant at the scene of the shooting itself, and Matthew Clement, who placed defendant with the others just before the offense, the prosecutor established a link between defendant and the crime through testimony that defendant led the police to a 410-gauge shotgun that was hidden after the shooting. Although we agree with defendant that there were clearly credibility issues associated with the testimony of the three accomplice witnesses, those issues were fully presented to the jury. Each witness testified that he had pleaded guilty to reduced charges pursuant to a plea agreement that required him to testify at defendant's trial and none of them had yet been sentenced. In addition, the jury was presented with evidence that the witnesses had previously made inconsistent statements during prior police interviews, during prior testimony, or at their plea hearings. However, these inconsistencies and interests for testifying do not establish that the prosecutor knowingly presented false testimony to obtain defendant's convictions.

A testifying accomplice's inconsistent testimony, like prior inconsistent statements, affects his credibility. See *People v English*, 302 Mich 463, 469; 4 NW2d 727 (1942) (inconsistent testimony); *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002) (inconsistent statements). But the credibility of the testimony of an accomplice, including one who may have a special interest in testifying, is for the jury to resolve. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Defendant has not shown anything about the witnesses' interests in testifying, or the inconsistencies in their testimony or prior statements, or the falsity of prior statements or testimony, that establishes that the prosecutor knowingly elicited or used false testimony to obtain a conviction. Accordingly, a plain error has not been shown.

The prosecutor also commented on the credibility of the accomplice witnesses during closing and rebuttal arguments. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Brown*, 279 Mich App at 135. The prosecutor's challenged remarks in this case clearly recognized that there were credibility issues for the jury to decide, but a prosecutor is free to comment on the credibility of witnesses based on the evidence. *People v Unger*, 278 Mich App

210, 240; 749 NW2d 272 (2008). Defendant has not demonstrated that the prosecutor's remarks were improper.

Defendant also argues that the prosecutor engaged in misconduct during closing argument by commenting on the possible penalties that Thornton, Ricky Clements, and Matthew Clement faced because of their decisions to plead guilty. He asserts that the prosecutor's statements were incomplete or misleading, primarily because the prosecutor did not explain the role of the sentencing guidelines in determining an appropriate sentence for each witness. Defendant's failure to object to the prosecutor's remarks limits our review of this issue to plain error affecting defendant's substantial rights. *Brown*, 279 Mich App at 134.

In reviewing defendant's argument, we are mindful that a prosecutor's clear misstatement of the law, which remains uncorrected, may deprive a defendant of a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, it is the trial court's duty to instruct the jury on the applicable law. MCL 768.29. Prosecutors are not permitted to instruct the jury on points of law, but are permitted to base arguments on the trial court's instructions. *People v Szczytko*, 390 Mich 278, 287; 212 NW2d 211 (1973) (opinion of BRENNAN, J.). Prosecutors are also permitted to argue the evidence and make reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

In this case, the prosecutor's remarks accurately represented the maximum sentences that each witness faced under their plea agreements. Contrary to what defendant argues, the prosecutor's remark that "[t]hey pled to a crime also punishable by life, but not mandatory life. . . . They know they could go to prison for life. They could get a term of years sentence, but they don't know what it is," did not refer to Matthew Clement. Rather, the prosecutor separately argued that Matthew was "allowed to plead guilty to a lesser offense called conspiracy to commit unarmed robbery, which is punishable by fifteen years as opposed to life." Thus, the record does not support defendant's claim that the prosecutor's closing remarks were factually inaccurate as they pertained to Matthew.

Although defendant also correctly observes that the prosecutor did not address testimony elicited from Thornton, Ricky Clements, and Matthew Clement regarding the effect of the sentencing guidelines, or their expectations of their possible minimum sentences, we are not persuaded that the prosecutor had a duty to do so. Defendant's reliance on *People v Enos*, 168 Mich App 490; 425 NW2d 104 (1988), is misplaced because, unlike in *Enos*, there was evidence in this case to support the prosecutor's argument regarding the statutory maximum sentences that the witnesses faced because of their pleas. We also reject defendant's suggestion that the prosecutor had an obligation to speculate on how a sentencing judge might apply the sentencing guidelines in determining the minimum sentences for each accomplice witness, let alone to ensure that the jury was properly informed on the law with regard to the sentencing guidelines. In sum, defendant has not established plain error with respect to the prosecutor's comments regarding the sentencing consequences of the accomplice witnesses' plea agreements.

Defendant additionally asserts that the trial court erroneously instructed the jury that Thornton, Ricky, and Matthews made plea agreements "about the charges against them" and "[y]ou have also heard that each of those witnesses faced a possible penalty of life in the state prison as a result of those charges. You are to consider this evidence only as it relates to the witness's credibility . . . [.]". Jury instructions are examined in their entirety to determine if there

is error requiring reversal. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Where, as in this case, a defendant does not object to the court's instructions, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The challenged instruction that each witness "faced" a possible penalty of life, having been stated in the past tense and in reference to the evidence introduced at trial, is fairly construed as addressing the maximum penalty of life imprisonment that each witness, including Matthew Clement, faced before entering into a plea agreement. Examined as a whole and in light of the trial court's other instructions to assist the jury in assessing the credibility of the witnesses, defendant has not shown a plain instructional error. The instructions were sufficient to fairly present the credibility issues to the jury and to protect defendant's rights. *Goydosh*, 203 Mich App at 237.

III. CUMULATIVE ERROR

Defendant argues that the errors addressed in section II of this opinion cumulatively operated to deny him a fair trial. But having found no actual errors, we reject defendant's request for relief under a cumulative error theory. *Brown*, 279 Mich App at 145-146.

IV. SENTENCING GUIDELINES

Next, defendant argues that he is entitled to resentencing because the trial court erred in scoring 15 points for offense variable ("OV") 10, 25 points for OV 13, and ten points for OV 14 of the sentencing guidelines. At sentencing, the trial court scored a sentencing information report ("SIR") for each of defendant's convictions. Defendant received 175 total offense variable points on the SIR for the second-degree murder conviction, and 185 total offense variable points on the SIRs for the remaining convictions. These totals are well in excess of the 100 and 75 points necessary for placement in the highest level of offense severity for the various offenses. See MCL 777.61; MCL 777.62; MCL 777.63. Thus, as defense counsel conceded at sentencing, even if each challenged offense variable was scored at zero points, the scoring adjustments would not affect the appropriate guidelines range. Accordingly, there is no basis for resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); MCL 769.34(1). Nevertheless, because a scoring error might have other consequences for a defendant, see *People v Melton*, 271 Mich App 590, 593, 722 NW2d 698 (2006), we shall consider defendant's arguments.

We review de novo the legal questions involved in the interpretation and application of the legislative sentencing guidelines. *People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009). However, the trial court has the discretion to determine the points to be scored, so long as record evidence adequately supports a given score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* Evidence that properly may be considered by a sentencing court includes the evidence admitted at trial and the contents of a presentence report. *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008). Any findings of fact made by a trial court at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

We find no merit to defendant's argument that it was improper to score OV 13, MCL 777.43, at 25 points based on conduct already considered in the scoring of the prior record variables. See *People v Bemar*, 286 Mich App 26, 35; 777 NW2d 464 (2009). We also reject defendant's argument that the evidence did not support a ten-point score for OV 14 (leader in a multiple offender situation). MCL 777.44. As argued by the prosecutor at sentencing, the trial evidence and the uncontested information in the presentence report support a finding that defendant acted as a leader by providing weapons for the offense.

We also disagree with defendant that the evidence did not support the trial court's 15-point score for OV 10, based on predatory conduct. MCL 777.40(1)(a). Fifteen points are properly scored under OV 10 where the evidence supports each of the following:

- (1) Did the offender engage in conduct before the commission of the offense?
- (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
- (3) Was the victimization the offender's primary purpose for engaging in the preoffense conduct? [*People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008).]

Defendant's counsel argued at sentencing that 15 points could not be scored under OV 10, adopting the argument presented for codefendant Lopez at Lopez's sentencing. However, this Court upheld the scoring of 15 points under OV 10 for Lopez, and our Supreme Court denied leave. *People v Lopez*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2009 (Docket No. 286852), lv den'd 486 Mich 928 (2010). Accordingly, we hold, as did the *Lopez* panel, that:

Because the trial court in scoring OV 10 at 15 points cited the time of night when the robbery took place and defendant's securing of weapons and his group of accomplices, the court did not abuse its discretion when it found that defendant had engaged in preoffense predatory conduct intended to victimize the elderly victim. [*Id.* at 37.]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro